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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 138

PAUL O. JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on April 21, 1969.

OPINIONS BELOW

The opinion of the District Court for the Western District of Missouri, Southwestern Division (Appendix B) is reported at 284 F.Supp. 273. The opinion of the Court of Appeals for the Eighth Circuit has not yet appeared in the advance sheets but is set out in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on April 21, 1969 (Appendix A-A1). Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

In a given year as many as 100,000 farm producers have been required by law as a condition of payment to sign a boilerplate document prepared and printed by the government as Form ASCS-820 (see Photocopy-Appendix A-A7). This year as much as 4½ Billion Dollars may be paid on such a certificate. On this document, without warning of criminal prosecution, is written in small type:

> "I hereby certify that for the program year indicated above I have complied with and will comply with all the requirements under the Conservation Reserve Program and that the gross payments shown hereon to be due me is correct, * * *."

Petitioner signed such a form in 1963. A dispute arose as to whether he had a right late in that year, after the growing season was over, to construct sewers, roads, water lines, gas lines and other acts designed to convert land to residential purposes on land which was to be withdrawn from the program in 1964. This dispute resulted in a civil action brought by petitioner to prevent a forfeiture of all payments made to him under the contract and to prevent cancellation of the contract and to prevent civil penalties from being assessed against him. (See attachments to Suggestions in Support of After Trial Motion.) In the course of this civil action, petitioner in 1967 was indicted for alleged violation of Title 18 U.S.C., Sections 287 and 1001, the false claim and false statement sections.

Throughout the actions petitioner has contended the certificate signed by him is a mere non-factual conclusion of law which was never intended by Congress to be the basis of a charge under Section 287 or 1001 and therefore, the certificate cannot be the basis of the indictment of petitioner. Petitioner also contended that he could not lawfully or constitutionally be held to be in violation of his contract simply because he constructed sewers, roads, water lines, gas lines and houses late in 1963, after the 1963 growing season was over, on land which was to be withdrawn from the program in 1964.

The District Court held that the quoted certificate was not a conclusion of law (*United States* v. *Johnson*, 284 F.Supp. 273, 279, Appendix B). The Court of Appeals apparently conceded it was a conclusion of law but held it was not a "reasonable and permissible conclusion" (Appendix A-A10). The Court of Appeals based this *legal conclusion* upon a series of events listed at page A-A10 of Appendix A, all of which events occurred after October 8, 1963, the date of the certificate, and could not have entered the determination as to whether the legal conclusion was reasonable or permissible.

The District Court held that petitioner did not have a right late in 1963, after the end of the crop growing season, to construct sewers, etc. on land which was to be withdrawn from the program in 1964 (*United States* v. *Johnson*, 284 F.Supp. 273, 280, Appendix B). The Court of Appeals opinion ignored petitioner's argument and apparently confused Gov't Exh. 58, Para. 57 (Appendix C-A49), with Regulation 750.513(b) (*United States* v. *Johnson*, Appendix B).

The questions presented are:

(1) Whether the ASCS-820 certificate is a non-factual conclusion of law and, if so, whether making a mere conclusion of law, a non-factual statement, was intended by Congress to be the basis of a false claim or false statement felony charge under Title 18 U.S.C., Sections 287 and 1001.

(2) Whether petitioner had reasonable grounds for believing that as a matter of law he had a right to construct sewers, etc. late in 1963 after the end of the crop growing season on land which was to be withdrawn from the program in 1964, and, if so, whether the acts of petitioner were in violation of his contract, and, if not, whether he can be convicted for doing those same acts.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This Application involves the Fifth Amendment to the Constitution of the United States which provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

and the pertinent statutes are 18 U.S.C., Section 287 (Appendix A-A2, footnote 2) and 18 U.S.C., Section 1001 (Appendix A-A2, footnote 3) and 7 U.S.C., Section 1804, which is set out in Appendix C-A48.

The pertinent Regulations of the Department of Agriculture are 24 F.R. 7987, October 3, 1959, amended 28 F.R. 6643 and Paragraph 57 of Section 15.B of the County Conservation Handbook (Gov't Exh. 58, R. 829) which Regulations are set out in Appendix C-A49.

STATEMENT

Petitioner was convicted, fined and sentenced on two counts of a four-count indictment. Count III charged a false claim on October 8, 1963 on an ASCS-820 form for soil bank payments in violation of 18 U.S.C. 287. Count IV charged a false statement on the same date on the same form in violation of 18 U.S.C. 1001. Petitioner was acquitted under Counts I and II.

The basic facts are as follows: Petitioner and his wife purchased a 440 acre farm (R. 699) within the limits of Springfield, Missouri for development (R. 698). In 1959 he signed a Soil Bank Contract with the local ASC (Agriculture and Stabilization Committee) (Pf's Exh. 8, R. 26, 30).

Petitioner was only bound to do what was required by his contract. The contract and regulations provided that petitioner was required to maintain "cover" on the land (R. 20, 30, 44) except where land was to be withdrawn from the contract, in which case, with prior permission of the County Committee, producers could construct buildings, roads, gas lines, streets, pits, sewers, and water lines on land under contract but which was to be withdrawn (R. 33, Sec. 15.B, Para. 57, Gov't Exh. 58, R. 50, 56). There was no showing of any standards, hearing or limitations upon the discretion of the local committee in giving or withholding such permission; the committee had an uncontrolled discretion. The local committee modified petitioner's contracts on two prior years without penalty where he shifted land to a residential development use after the growing season was over (R. 211, 550-552).

Under the Contract, ownership was not the test of entitlement to payment under the contract; the test was control of the land (R. 32, 45). The making of a contract of

sale was not a violation; loss of control must be shown (R. 45). The issuance of building permits was not a violation of the contract; loss of control must appear (R. 45).

On October 8, 1963 petitioner went to the ASCS office and requested payment (R. 200). He advised committee members that he had contract to sell 105 acres of the land (R. 201, 504). The ASCS form did not contain any factual questions on representations (Appendix A-A7). Petitioner signed the form and received payment.

THE INDICTMENT

Count III (full text at Appendix C-A50) charged that petitioner violated Sec. 287 in that he made a false, fictitious and fraudulent claim to the ASC Committee on Form ASCS-820 for payment on 251 acres of land then knowing that he was not entitled to that sum because:

(1) He had lost control of 90 acres; and

(2) He had destroyed or permitted cover to be destroyed by constructing roads, sewers, water lines, gas lines and houses; and

(3) He had caused hay to be harvested.

Count IV (full text at Appendix C-A51-A52) charged that petitioner violated Sec. 1001 in that he certified on Form ASCS-820 that he had complied with and would comply with "all the requirements under the Conservation Reserve Program and that the gross payment shown" thereon was correct then knowing that he had not complied and did not intend to comply with the requirements, in that:

(1) He had not reported loss of control of 90 acres;

(2) He had destroyed grass cover by installation of sewers, water lines and gas mains;

(3) Contracts had been entered into for construction of roads, sewers, water lines and gas mains;

(4) Building permits had been issued for the construction of houses; and

(5) Hay had been harvested.

THE INSTRUCTIONS

Under the Court's instruction (R. 821-846) the jury had no choice but to convict petitioner if he failed to comply with each and every requirement of the Regulations (R. 827, 831). Thus, it cannot be said just which alleged breach of contract the jury found as the basis of their verdict.

REASONS FOR GRANTING WRIT

The decision below should be reviewed for each of the following reasons:

(1) The opinion conflicts with the apparent intent of Congress, as expressed or implied in many Court of Appeals decisions, that a non-factual conclusion of law cannot be the basis of an indictment and conviction under Sections 287 and 1001 and the judgment is a radical and unfair departure from a policy which for more than a hundred years has failed to produce a single federal criminal fraud case based upon a non-factual conclusion of law.

(2) The opinion conflicts with the apparent intent of the statutes and regulations as expressed in a previous opinion by the Court of Appeals for the Eighth Circuit and as expressed in an opinion by the Court of Appeals for the Ninth Circuit in that petitioner had reasonable grounds for believing that he had a right which could not be arbitrarily denied by the ASC Committee to construct sewers, etc. late in 1963, after the end of the growing sea-

son, on land which was to be withdrawn from the program in 1964 and therefore those acts could not be in violation of his contract and his conviction under these circumstances violates the due process clause of the Constitution of the United States.

(3) This is an important matter of federal law involving thousands of citizens who have signed ASCS-820 Forms without any warning and without any way of knowing they could be subjecting themselves to federal prosecution under Sections 287 and 1001.

I

The Opinion Conflicts with the Apparent Intent of Congress, As Expressed or Implied in Many Court of Appeals Decisions, That a Non-Factual Conclusion of Law Cannot Be the Basis of an Indictment and Conviction under Sections 287 and 1001 and the Judgment Is a Radical and Unfair Departure from a Policy Which for More Than a Hundred Years Has Failed to Produce a Single Federal Criminal Fraud Case Based Upon a Non-Factual Conclusion of Law.

The government simply contends that the statement that petitioner "has complied * * * with all the requirements under the Conservation Reserve Program * * *" is false and fraudulent. Under Count III they contend it rendered the claim fraudulent. Under Count IV they contend it was a false statement. The only requirements were those of the contract. Thus, petitioner stated in effect that *he had complied with his contract, that he would comply and that he was entitled to his payment.* Not one fact was charged to have been stated in the indictment. Not one fact was called for in the certificate. Whether a person has complied with this contract would seem the clearest legal conclusion. If a conclusion can be reached by rea-

soning alone, it is a conclusion of fact; but whether petitioner had complied with all the contractual requirements made necessary a determination of his duties under the Constitution of the United States, the Statutes of the United States, the Regulations and the contract. Notice all the Regulations read into evidence!! It was necessary to determine the legal significance of the fact situation under the applicable laws. *United States* v. *Diogo,* (CCA 2d, 1963) 320 F.2d 898. It was necessary to determine under the law what may legally or constitutionally be required of petitioner. It was necessary to determine if those requirements were necessary for payment. 7 U.S.C., §1804 (Appendix C-A48); *United States* v. *Maxwell,* (CCA 8th, 1960) 278 F.2d 206. Then it was necessary to determine if any technical failure to comply tends to substantially defeat the purposes of the Soil Bank Act. *Shay* v. *Agricultural Stabilization and Conservation Committee,* (CCA 9th, 1962) 299 F.2d 516, 522. After this process a legal conclusion that he has "complied" could be rendered. The Court of Appeals tacitly admitted this involved a conclusion of law (Appendix A-A11-A12).

37 *Am.Jur.*2d, Title: *Fraud and Deceit,* Sec. 73, p. 113, states:

> "It is accordingly well settled, as a general rule that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law."

In 2 *Wharton's Criminal Law and Procedure,* Anderson, Sec. 591, p. 332, it is stated:

> "Ordinarily there is no criminal responsibility for a false representation which is a statement or opinion as to law."

TRIPLE CHALLENGE!!!

Before the District Court petitioner challenged the government to produce a single prior federal conviction under Sec. 287 or 1001 which has not involved a misrepresentation of fact. The District Court did not attempt to name such a case. Again before the Court of Appeals petitioner challenged the government to produce such a case. This challenge was dodged by the Court of Appeals opinion in these words:

> "The defendant's contention, that there are no other cases involving prosecutions under §287 or its predecessor for failure to comply with the terms of a contract with the government, is without merit. See, *Imperial Meat Company* v. *United States*, 316 F.2d 435 (10th Cir.), *cert. denied*, 375 U.S. 820 (1963); *United States* v. *United States Cartridge Co.*, 95 F.Supp. 384, 393 (E.D. Mo. 1950), *aff'd*, 198 F.2d 456 (8th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953)."

It is true there have been cases involving failure to comply with contracts; but there have been no convictions under Sections 287 or 1001 (or similar statute) which have not involved misrepresentation of fact as distinguished from a conclusion at law.

The closest federal case is *U. S.* v. *Outer Harbor Dock & Wharf Company*, (U.S. Dist. Ct., S.D. Cal., 1954). 124 F.Supp. 338, which considered a declaration that the defendant company was obligated under a lease to remove warehouse buildings (at least one degree more factual than the case at bar, because it was limited to a particular contractual duty and legal conclusion). In finding defendants not guilty of criminal fraud, the court in the *Outer Harbor* case at page 345, stated:

> "Criminal fraud is not to be inferred from an erroneous expression of opinion as to the effect of a contract."

The Sixth Circuit held that Section 1001 does not apply to the introduction of evidence in a criminal proceeding, even though literally a technically false document may have been presented. In *U. S.* v. *Erhardt*, (CCA 6th, 1967) 381 F.2d 173, 175, the Sixth Circuit cited the Court of Appeals for the District of Columbia for the statement that:

> "... neither Congress nor the Supreme Court intended the statute to include traditional trial tactics...."

Yet, in our case Sections 1001 and 287 are applied to traditional legal conclusions. In taking this position the trial court has plunged into a new area heretofore not supported in the case law construing these sections.

What fact was stated? What fact was stated falsely? Even courts which rest fraud on promissory representations do not abandon the requirement that there be facts misrepresented; the reasoning that the "state of a man's mind is as much a fact as the state of his digestion" is clear recognition that in fraud some fact must have been misrepresented.

SIGNIFICANT ABSENCE OF CASES

Surely, if Sections 287 and 1001 were intended by Congress to be applicable to legal conclusions, there would be some cases decided since 1934 when Section 1001 was amended "to substantially its present form". *Friedman* v. *U. S.*, (CCA 8th, 1967) 374 F.2d 363 at 366.

See *United States* v. *Bramblett*, (1954) 348 U.S. 503, 99 L.Ed. 594, 75 S.Ct. 504, 506, wherein Mr. Justice Reed reviews the statutory history of Sections 287 and 1001 in detail. In 1948, Title 18 was revised and 1001 and 287 were separated. Such statutes proscribing false statements and false claims have been on the books since the Act of March 2, 1863, 12 Stat. 696, which applied to military personnel.

For 106 years similar statutes have been on the books. If the trial court's interpretation of this case stands, this case will for the first time establish the rule that the mere declaration that a man has complied with his contract will support a criminal fraud charge.

We repeat, this case stands alone. It would be impossible to conceive of a more fundamental, basic, legal conclusion than the one relied upon by the government in this case. Is this Court ready to say that petitioner should be charged or convicted under Sections 287 or 1001 on a conclusion such as this? *Are the many thousands of persons who have signed ASCS-820 Forms without warning of the threat of criminal prosecution in jeopardy if "all" the requirements of the law have not been complied with?*

CONGRESSIONAL INTENT

It is reasonable to believe that if Congress intended this interpretation of Sections 287 and 1001 (considering the long history, the words used, and ordinary fairness to citizens) Congress would have explicitly so stated.

As Mr. Justice Blatchford stated in *United States* v. *Brewer*, 139 U.S. 279 at 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. CC 118. Before a man can be punished, his case must be plainly and unmistakable within the statute."

Numerous federal cases have referred to the requirement that there must be a misrepresentation of "fact". See *Boushea* v. *U. S.*, (CCA 8th, 1949) 173 F.2d 131, 134 ("statement of an existing fact"); *Rolland* v. *U. S.*, (CCA 5th, 1953) 200 F.2d 678, 679, note 4 ("To summarize—Fraud consists in the false representation of a material fact. * * *"); *U. S.* v. *U. S. Cartridge Co.*, 95 F.Supp.

384, 393 (cited by the Court of Appeals—saturated with statements that there must be misrepresentation of "material facts"); *Imperial Meat Co.* v. *U. S.*, (CCA 10th, 1963) 316 F.2d 435 does not support the opinion below (although cited by the Court of Appeals, Appendix A-A12). At page 439 the Court of Appeals for the Tenth Circuit stated:

> "The indictments charged a violation of Title 18 U.S.C., Sec. 287. Appellants argued below and assert here that the indictment did not state in what particular the claim was false or fraudulent. The claim presented stated that the order for subsistence was correct and just and that payment had not been received. Appellants thus contend that this certificate had nothing to do with how the order was filled. The appellants, as the trial judge stated, were charged with presenting an invoice claiming payment for *a certain grade of meat when in fact meat of an inferior grade had been delivered.* The certificate referred to an order for subsistence bearing a certain number and when reference is made to these orders there is a clear description of the grade." (Italics added).

In short, there was a *factual* misrepresentation. There are no convictions under 287 and 1001 where there were no factual representations.

If the Department of Agriculture desired, it *could* have required recipients of payments to sign formal statements. It could have placed a warning that the answer was under penalties of Sections 287 and 1001. *It could have, but it did not do so.*

II

Petitioner Had Reasonable Grounds for Believing That He Had a Right Which Could Not Be Arbitrarily Denied by the ASC Committee to Construct Sewers, Etc., Late in 1963, After the End of the Growing Season, on Land Which Was to Be Withdrawn from the Program in 1964 and Therefore Those Acts Could Not Be in Violation of His Contract and His Conviction under These Circumstances Violates the Due Process Clause of the Constitution of the United States.

The local committee had the power to say which producer could build a house (or sewer, etc.) and which could not (Sec. 15.B, Para. 57, County Conservation Handbook) (Gov't Exh. 58, R. 829, Appendix C-A49). This raw, naked power, not dependent upon any hearing, findings or standards, permitted the local committee to arbitarily determine what could or could not be done. *How could anyone know on October 8, 1963 what the committee would or would not do as to acts occurring thereafter?* Under the due process clause of the Fifth Amendment, may this right be denied petitioner when it is permitted others? May two citizens each do the same acts, under identical statutes, identical regulations, and identical certificates, yet one be convicted under Sections 287 and 1001 and the other go free at the caprice of a local ASC Committee?

In *Yick Wo* v. *Hopkins*, (1886) 118 U.S. 356 the Supreme Court struck down such discriminatory power in the hands of a local laundry board. There this Court declared an ordinance constitutionally void which delegated naked, arbitrary power to a board to grant or withhold consent to run a laundry. "They seem intended to confer, and do actually confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." *Yick Wo* v. *Hopkins*, supra, at page 225.

In *Yick Wo* this Court further stated at 228:

> "No reason whatever, except the will of the supervisors, is assigned why (the petitioners) should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood."

In our case we might substitute a few words and the statement would read:

> "No reason whatever, except the will of the local ASC Committee, is assigned why (the petitioner) should not be permitted to build sewers, roads, etc. and be permitted to carry on, in his accustomed manner in his harmless and useful occupation from which he earns his livelihood."

In *Yick Wo* the Supreme Court held the petitioner had a right to do so. In our case we contend petitioner had the right to do so. If petitioner had the right, then his certificate could not be the basis of a federal false claim or false statement conviction.

The power to administer is not the power to make law. In the absence of a statute or contract provision imposing a duty upon a person accused of a crime, a court will refuse to manufacture such requirement. *Jacobs* v. *United States*, (CCA 8th, 1966) 395 F.2d 960. Surely, it is unconstitutional to permit the local ASC Committee to manufacture such requirement by giving that committee the naked power to grant or deny consent to the things defendant did.

III

This Is an Important Matter of Federal Law Involving Thousands of Citizens Who Have Signed ASCS-820 Forms Without Any Warning and Without Any Way of Knowing They Could Be Subjecting Themselves to Federal Prosecution under Sections 287 and 1001.

It is estimated by the Department of Agriculture that in this program alone in a given year from 35,000 to over

100,000 persons have signed certificates. This involves the payment in a year of as much as $4,500,000,000.00. Petitioner does not know how many other departments of the government require such certificates, but if they can be used as a club to compel strict compliance here, they will, no doubt, abound. It is respectfully submitted a citizen has a right to contract with his government without being constantly under the ax of criminal prosecution. It is important that the Supreme Court pass upon such threatened liability.

CONCLUSION

Because the opinion below conflicts with the intent of Congress, because it conflicts with the traditional scope of the criminal statutes, because it conflicts with the accepted limitations of criminal fraud, because it supports a conviction which depends upon the caprice of a local ASC Committee, because it supports a discriminatory application of the federal criminal statutes, because thousands of citizens may have subjected themselves to criminal prosecution for signing statements not known by them to carry such penalties, it is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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